NO. 48869-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL WILLIAM RICHIE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 13-1-03881-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant unable to establish his counsel was disparaged by rebuttal that correctly described the court's instructions on his now vacated robbery count, or prove rebuttal directed at that count prejudicially affected the assault conviction singularly at issue in this second appeal?

2. Should defendant's premature request to pass his appellate costs along to taxpayers be denied when there is no cost bill before this Court and there is nothing unjust in a man fairly convicted of clubbing a store clerk over the head with a full liquor bottle being ordered to repay the public some small measure of the cost it advanced for his second appeal?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant with first degree robbery and second degree assault for repeatedly bludgeoning a Walgreens' clerk with one of two 750 ml liquor bottles he was attempting to steal from the store despite her brave effort to stop him. CP 1-2, 106-07.[1] The State called six witnesses. CP 108. Defendant testified to an impeached version of events. CP 108; *e.g.*, 5RP 406, 449. Fifteen exhibits, to include video of the crime, were admitted. CP 109-10 (Ex. 2). A jury accurately instructed on second degree assault convicted defendant of that offense, as well as first degree robbery. CP 3-4; 69-96. A mandatory life sentence was imposed for the robbery—a third strike, which capped a criminal career with convictions

for two second degree robberies, first degree reckless burning, unlawful firearm possession, two forgeries, and attempt elude. CP 54. The other current second degree assault conviction, also a strike offense, merged at sentencing. *Id.*; 9RP 625.

Defendant's first appeal resulted in this Court reversing the robbery conviction for omission of an implied ownership or representative interest element from the robbery instructions. ***State v. Richie***, 191 Wn.App. 916, 921-24, 926-27, 365 P.3d 770 (2015). This Court refrained from reaching a challenge to the closing argument. *Id.* at fn.1. The case was remanded with reference to reinstatement of the assault conviction. *Id.* at fn.7 (citing ***State v. Turner***, 169 Wn.2d 448, 466, 238 P.3d 461 (2010)). Resentencing was held April 22, 2016. RP(4/22); CP 51. Reinstatement of the assault was elected over retrial of the robbery. RP (4/22) 5; ***Richie***, 191 Wn.App. at 924-25. Despite two prior strike offenses, and his most recent act of clubbing an innocent woman over the head with a liquor bottle, defendant said his sentence was unjust punishment for a drug problem, then actually stated: "I've never done anything," qualifying that to mean *never killed anyone*. RP (4/22) 9. His notice of appeal was timely filed. CP 64.

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[1] Citations above CP 105 estimate the numbering of supplemental designations.

2. Facts

Kersten Gouveia was a 35 year woman who had been working at Walgreens for 11 years as she walked to begin her graveyard shift at the Spanaway store sometime near 11:00 p.m. September 22, 2013. 4RP 285-86. To avoid being late, she customarily arrived 20 or 30 minutes early. 4RP 286. As she approached the Walgreens parking lot, she noticed two people acting suspiciously in a car, which just backed into a parking stall nearest the front doors. 4RP 287-88, 291-92; 5RP 369.

Gouveia immediately went inside to alert her manager. 4RP 292. She was wearing a Walgreens shirt bearing the store's logo under a coat with a neck-lanyard bearing an employee name tag. 4RP 286-87, 294; 5RP 387-88. Gouveia resumed her pre-shift routine when a manager could not be found. 4RP 292. Defendant entered the store, then proceeded directly to the liquor wall where he grabbed two 750 ml "E & J" liquor bottles from the shelf, disregarding a sign directing customers to "Ask For Assistance." 4RP 292, 295, 301, 325, 327, 333. Gouveia recognized him to be one of the people acting suspiciously in the parking lot. 4RP 294. At trial, the driver (James Beeson) admitted to waiting outside with the motor running while defendant was inside the store. 5RP 393-94.

Gouveia instructed a cashier who had only been on the job for two weeks to announce a "code 80," which alerts employees to active thefts. 4RP 292, 295, 326. She advised the cashier to watch defendant based in part on his act of "looking back and forth, side to side" while taking the

bottles, as if he did not intend to pay. 4RP 296, 311, 322, 324. The cashier perceived defendant was preparing to "bolt with the alcohol." 4RP 338. Gouveia feigned small talk with the cashier to position herself in his likely escape route. 4RP 296,324-25. When he passed the point of sale with the liquor bottles, she addressed him by stating: "Sir, you need to pay for that here. Let me help you," as did the cashier, consistent with loss-prevention protocol. 4RP 296, 304, 311, 326-27, 332-33.

Defendant pressed on without stopping as he held a bottleneck in each hand. 4RP 303-04, 311, 328, 333-34, 352. Gouveia reached for them to "giv[e] him good customer service." 4RP 296, 302, 328. Defendant responded by clubbing her in the head with the heel of one of the full-liquor bottles, leaving a moon-shaped gash on her head. 4RP 296, 301-02, 333; 5RP 372. Gouveia "grabb[ed]" the other bottle, so defendant dragged her out of the store by it as she hung onto it "for dear life." 4RP 296, 315, 327, 339, 352. Outside, defendant swung a bottle down on her head four or five more times in rapid succession. 4RP 303.

A manager responded to the "code 80" alarm sounded at Gouveia's request. 4RP 291-92; 5RP 364. Defendant's driver pulled the car out, then opened the passenger door. 5RP 395, 407. Defendant panicked, jumped in, stating: he "could be arrested for this." 5RP 408. He actually said: "he was going to get arrested for this and ... already has two strikes against him,"

which explained his panic in terms of the third strike he knew was just committed; however, reference to the strikes was excluded based on an appraisal of its prejudicial effect. 5RP 440-42, 454-65. Gouveia's manager was able to get a partial plate number just before the driver "hit the gas;" causing the tires to spin. 5RP 369-71, 396. Defendant tumbled out with the bottles, causing them to shatter on the pavement. 4RP 297; 5RP 486. He jumped back into the car as it sped away. 4RP 297.

The manager had never seen an employee injured like Gouveia. 5RP 371. "She was just covered in blood." 5RP 371. Her dripping wounds left a bloody trail through the store. 4RP 298-99, 328, 330; 5RP 372. The bleeding continued until paramedics arrived. 5RP 374. Surveillance video of the incident was published at trial. 4RP 279-80, 307, 361; 5RP 376-78, 412; Ex. 2, 5-13. Defendant's driver was identified through investigation of the getaway car, which in turn led to defendant's arrest. 5RP 414-17.

Gouveia was transported to the hospital by ambulance. 4RP 280, 298. It took approximately five hours to treat her injuries, which included a cut forehead, concussion, and a gash that required 13 staples to seal—all inflicted so defendant could make off with less than $30.00 worth of alcohol. 4RP 298-99, 303; 5RP 478. The manager picked Gouveia up from the hospital around 3:00 A.M. 5RP 374. She was bandaged, still wearing her blood covered shirt. 5RP 374-75.

Defendant testified at trial. 5RP 447. He admitted to his forgery and false statement convictions, then claimed he went into Walgreens to purchase the liquor he took without paying. 5RP 448-49, 453. He said the driver was paid $7.00 to take him to the store, which was impeached by the driver's testimony. 5RP 406, 449. Defendant admitted "snatch[ing]" one of the bottles from Gouveia, explaining her injuries as the inadvertent consequence of his effort to get away. 5RP 451-53, 468-69, 472-73, 482-83. According to him, he entered the car not realizing the bottles were in his hands, and did not return to pay because they broke when he fled. 5RP 453, 486. On cross-examination defendant said the injury-causing incident was nothing more than "an event that happened," which only "became [] important ... when [he] was charged." 5RP 471.

By the time of trial Gouveia still experienced the long-term effects of what defendant perceived to be an event without importance beyond its effect on his life. 4RP 300-01. The head trauma he inflicted was followed by an appreciable decrease in her comprehension and memory. 4RP 300-01. The bottle-shaped gash he cut into her hairline became a scar visible to her whenever she looked in a mirror. 4RP 276-77, 301. And she was rewarded for the uncommon courage in her selfless effort to stop his theft by being ignominiously discharged two weeks later—after eleven years of employment—for violating a policy requiring submission to thieves. 4RP 375-76.

C. ARGUMENT.

1. DEFENDANT CANNOT PROVE HIS COUNSEL WAS DISPARAGED BY REBUTTAL WHICH CORRECTLY RECALLED JURORS TO THEIR INSTRUCTIONS ON A VACATED ROBBERY COUNT; NOR CAN HE PROVE REBUTTAL AIMED AT THAT COUNT PREJUDICED THE VERDICT ON THE WELL-PROVED AND NOW REINSTATED ASSAULT COUNT AT ISSUE IN THIS APPEAL.

Prosecutors are afforded wide latitude to argue against a defense theory of the case. ***State v. Russell***, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Defendants seeking reversal of their convictions based on alleged disparagement of counsel's role or integrity must prove the prosecutor made a disparaging remark so prejudicial there is a substantial likelihood it altered the outcome of the case. ***State v. Thorgerson***, 172 Wn.2d 438, 452, 258 P.3d 43 (2011); ***State v. Magers***, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Remarks are viewed in context of the entire argument, issues involved, evidence addressed and instructions given. ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008).

Reversal is not warranted for rebuttal invited by defense counsel, unless impertinent or incurably prejudicial. ***Russell***, 125 Wn.2d at 86 (citing ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)). Waiver attends failure to timely object absent incurably flagrant and ill-intentioned misconduct. *See* ***Thorgerson***, 172 Wn.2d at 443. Remarks are

flagrant when they contain flauntingly or purposely conspicuous errors of law. *See* e.g., ***Warren***, 165 Wn.2d at 28-29; ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)(citing Webster's Third New International Dictionary 862-63, 1126 (2002)). Remarks are "ill-intentioned" if they betray malicious disregard for a defendant's right to due process. *Id.*

a. Rebuttal exposing ways in which counsel's argument deviated from the instructions is not disparagement.

It is not disparagement for a prosecutor to express disagreement with defense counsel's arguments in the adversarial setting of summation. Prosecutors, as advocates, are allowed to make "strong, but fair" "editorial comments" responsive to defense argument. ***State v. Brown***, 132 Wn.2d 539, 566, 940 P.2d 546 (1997)("characterization of [] defense theory as 'ludicrous' reasonable in light of the evidence"). ***Russell***, 125 Wn.2d at 87. "[T]ruth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture...." ***United States v. Wexler***, 79 F.2d 526, 530 (2d Cir. 1935) (L. Hand); ***State v. Fleetwood,*** 75 Wn.2d 80, 84, 448 P.2d 502 (1968).

Improper disparagement is limited to argument that "disparagingly comment[s] on [defense] counsel's role or impugn[s] [counsel's] integrity." ***Thorgerson***, 172 Wn.2d at 451. Such argument maligns defense work as disreputable or its practitioners as deceptive. *E.g., Id.*; ***State v. Lindsay***, 180 Wn.2d 423, 431, 326 P.3d 125 (2014); ***Warren***, 165 Wn.2d at 29-30;

State v. Negrete, 72 Wn.App. 62, 67, 863 P.2d 137 (1993). There is no improper disparagement in rebuttal which fairly identifies how counsel's arguments are inconsistent with the court's instructions. ***State v. Carver***, 122 Wn.App. 300, 304, 93 P.3d 947 (2004).

This appeal follows imposition of sentence on defendant's now reinstated conviction for second degree assault. But defendant exclusively challenges as *disparagement* rebuttal that reminded jurors to strictly apply the instructions on the now vacated robbery count. App.Br.at 6, 8-10; ***Richie***, 191 Wn.App. at 921-24, 926-27. The rebuttal reminded jurors they should not modify their instructions to fit counsel's textually unsupported interpretation of the applicable law. Instruction No. 1 made it the jury's "duty to accept the law from [the court's] instructions." CP 70. The court's robbery instructions did not make conviction dependent on the victim having a "proprietary" or "superior interest" in the property underlying the offense. CP 76-80 (Inst. 5-9). Yet counsel argued proof of that interest was required. 6RP 557-58, 560-62, 564.

The prosecutor responded by correctly putting "rebuttal" in context as a challenge to counsel's "argument:"

> This is called rebuttal, so when the defense attorney gives *his argument*, I get a chance to get up and *respond to the arguments* that he made.

6RP 568 (emphasis added).

This segue correctly confined rebuttal to its dialectical purpose of challenging counsel's *arguments*, not his role or integrity. The introduction should be considered with the closing remarks that recalled instructions, to include the State's burden of proof. 6RP 536, 538-39, 543-45, 554-56. The rebuttal redirected jurors to their then binding robbery instructions, which did not require proof of a "proprietary" or "superior" interest. 6RP 568-69.[2] This textually grounded premise supported rebuttal that counsel's argument invited disregard for the law by urging jurors to hold the State to proof of facts not required by the instructions:

> The jury instructions that you have are not on a computer, so you can't do a word search to look for the word "proprietary" or the word "superior" but no matter how many times you look through them, you won't find them in the jury instructions.
>
> [] When the defense attorney writes up here "proprietary" and "superior" interest, what he's telling you is what you should do in order to give the defendant a fair trial is ignore the law. And go to that - -
>
> [] What the defense attorney is arguing to you is, please go to that robbery instruction - - and, actually, both robbery instructions – and at the end of those clauses, please write in for yourselves the word "proprietary" or the word "superior" interest. Add that in to the instructions and then deliberate. That's what the defense attorney is arguing to you.

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[2] Although the prosecutor was entitled to rely on the trial court's then valid instructions on the law applicable to robbery, it is worth noting the implied element this Court later found in robbery consisted of "ownership, representative, or possessory interest," not "proprietary" or "superior" interest as counsel argued. ***Richie***, 191 Wn.App. at 924.

> Now, the defense attorney also came back to you and said, well, ... the lawyers' statement and arguments are ... not the law, and it's not evidence. That's true. Don't do that because that's not the law. The law's in the instructions....

6RP 568-69. Two objections were made, both claiming misstatement of law, not disparagement. The rebuttal returned to the court's instructions:

> Use the law that's given to you, and the law that's given to you is exactly what's printed in Instruction No. 6 and Instruction No. 8. ...

6RP 570. The rebuttal closed by distinguishing argument from law:

> [D]on't do what the defense attorney is inviting you to do, which is write words into the instructions. Use the instructions [] the Court has given to you. Use the evidence that has been presented to you. Decide this case on what the law is, not on what you wish it were, not on what the defense attorney wishes it was. Decide it on what it is. ...

6RP 573-74.

In each instance, the rebuttal only made explicit counsel's implicit request for jurors to read "proprietary" or "superior" interest into their instructions. Prosecutors do not impugn counsel by redirecting the jury to their instructions' explicit text while explaining a way in which it does not support argument counsel made. Later disapproval of those instructions did not turn the rebuttal into improper argument because "prosecutor[s] may rely in good faith on ... rulings made by the ... trial judge and make arguments in reliance on those rulings." *See* ***Webb v. Michell***, 586 F.3d 383, 397 (6th Cir. 2009); ***State v. Powell***, 126 Wn.2d 244, 256, 893 P.2d

615 (1995). Clairvoyance is not a prerequisite for proper rebuttal, nor is avoidance of defense argument attributing to a trial court's instruction more meaning than its plain language can bear. *See* ***Carver***, 122 Wn.App. at 304-07; *see also* ***Matter of Pers. Restraint of Benn***, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (no duty to anticipate changes in the law).

Nor is proper rebuttal transformed into an attack on counsel's role or integrity through its incorporation of accessible analogies to capture a practical effect of accepting counsel's argument. *See* ***State v. Curtiss***, 161 Wn.App. 673, 700, 250 P.3d 496 (2011); ***Carver***, 122 Wn.App. at 304-05; ***Thorgerson***, 172 Wn.2d at 451. Application of "proprietary" or "superior" interest to the facts as urged by counsel meant adding an element absent from the instructions. The rebuttal fairly replied with an analogy which reframed the conceptual revisions argued by counsel as textual revisions to emphasize the error in counsel's approach.

This Court found similar rebuttal to be proper in ***Carver***:

> [T]he Defense kind of states the [intent element] a little bit differently []. They say he didn't knowingly fail to forget. That's not what it says. [] That's not an accurate statement of the instructions.

Carver, 122 Wn.App. at 304. There, as here, the jury was directed to: "[d]isregard any [] argument [] not supported by the ... law." *Id.* Invoking that instruction, the prosecutor argued:

> Every word—almost every word out of the Defendant's attorneys' mouth in the closing argument is not supported by the law .... You have to ignore that entire closing argument, that entire call for sympathy.

Id. The remarks were neither improper nor prejudicial as "[t]he prosecutor was entitled to correct the jury[] and inform it of the correct statute ...." *Id.* at 306-07. Like defendant, Carver framed the rebuttal's invitation to "ignore" counsel's argument as disparagement. His mischaracterization of the rebuttal was rejected since the rebuttal addressed misstatements of law in accordance with the prosecutor's "entitle[ment] to make a fair response" to counsel's arguments." *Id.* The same rule applies here.

Yet beyond merely misstating the law, counsel, by urging acquittal for a failure of proof not required by the instructions, urged nullification—a practice courts forbid as it "destroys the rule of law [by] engender[ing] anarchy." ***State v. Nicholas***, 185 Wn.App. 298, 308, 341 P.3d 1013 (2014). The rebuttal correctly brought the error to the jurors' attention by redirecting them to their instructions. Far from improper, the rebuttal neared the definition of proper, for no argument so closely aligns with the paradigm for deliberations as argument which reminds jurors they "must apply [] the instructions to the facts ... proved, and in th[at] way decide the case, and [] must disregard any ... argument ...not supported by the ... law in [the court's] instructions." CP 70 (Inst. 1).

b. Nothing in rebuttal exclusively targeted at counsel's misstatement of the trial court's robbery instructions is logically capable of incurably prejudicing the assault conviction actually at issue in this appeal.

Absent a timely objection, prosecutorial error cannot be raised on appeal unless the challenged argument was so flagrant and ill-intentioned no instruction could have cured the resulting prejudice. ***State v. Padilla***, 69 Wn.App. 295, 300, 846 P.2d 564 (1993). An objection is inadequate to preserve an issue for appeal unless it calls the trial court's attention to the specific error raised on appeal. *See Id.*; ER 103. Specific objections conserve scarce resources by enabling trial courts to correct alleged errors thereby avoiding costly appeals. *Id.*; ***State v. Robinson***, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Criminal defendants are typically not permitted to alter theories of error on appeal. *See* ***State v. Mak***, 105 Wn.2d 692, 718–719, 718 P.2d 407, *overruled on other grounds* ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the trial court, defendant claimed the challenged rebuttal was a misstatement of law, *not improper disparagement of counsel*, so relief for disparagement can only be granted on appeal if proven disparagement was so flagrant and ill-intentioned it could not have been cured at trial. It is a burden defendant cannot overcome. For even if disparagement is assumed in rebuttal that exposed counsel's deviation from the instructions, far more disparaging remarks have fallen short of incurable error. *E.g.*, ***Thorgerson***,

172 Wn.2d at 451-52 (alleging sleight of hand implied dishonesty yet was not outcome determinative); ***State v. Gonzales***, 111 Wn.App. 276, 283, 45 P.3d 205 (2002) (instruction could cure remark that unlike the defense, prosecutors pursue justice) (quoting ***United States v. Frascone***, 747 F.2d 953 (5th Cir. 1984)); ***Negrete***, 72 Wn.App. at 66 (claim counsel was "paid to twist" words not irreparably prejudicial).

Any prejudice attending the rebuttal would have logically adhered to the vacated robbery count. There is no support in the record or common sense for an inference it extended to the assault conviction at issue in this appeal. For it does not follow disagreement with counsel's interpretation of robbery undermined unrelated argument about the assault, which required:

> (1) That on or about the 22nd day of September, 2013, defendant:
> (a) Intentionally assaulted Kersten Gouveia and thereby recklessly inflicted substantial bodily harm; or
> (b) Intentionally assaulted [her] with a deadly weapon; and
> (2) Th[e] act occurred in the State of Washington.

CP 85 (Inst 14). A person acts with intent when acting with objective or purpose to accomplish a result. CP 86 (Inst.15). One acts recklessly when one knows of and disregards a substantial risk a wrongful act may occur and this disregard is a gross deviation from conduct a reasonable person would exercise in the situation. CP 87 (Inst. 16). "Substantial bodily harm" means temporary but substantial disfigurement, impairment of bodily function, or fractures. CP 88 (Inst.17). "Deadly weapon" means instrument

or article capable of causing death or substantial bodily harm under the circumstances in which it is used. CP 89 (Inst. 18).

Second degree assault's elements were not disputed. 5RP 499-500; 6RP 545-47, 559-61, 564-66; 568-74. There was consequently no aspect of counsel's grasp of the instructions on assault to which a misgiving from counsel's refuted remarks about robbery could attach. The notion of such a transferable misgiving relies on a fallacy of composition, for it is unsound to presume an attribute of one part necessarily affects the whole. *E.g.*, ***Richards v. State***, 37 So. 3d 925, 930 (2010). A better, controlling, presumption is jurors follow the instruction to test each argument against their instructions. ***Curtiss***, 161 Wn.App. at 700.

It is therefore according to the trial court's accurate-unchallenged instructions on second degree assault that each juror decided defendant's guilt, presumptively giving all legally supported argument its due. Their verdict is seemingly beyond reproach as it is supported by overwhelming evidence of defendant's guilt. An assault upon Gouveia was not entirely disputed in defendant's closing argument as he urged a verdict of assault in the third degree. 6RP 561. An assault was nonetheless proved through multiple witnesses corroborated by security video, which established he reacted to his interrupted theft by clubbing Gouveia over the head with a full-liquor bottle that left a moon-shaped gash on her head, before he swung the bottle down on her head four or five more times. 4RP 296, 279-80, 301-03, 307, 333, 361; 5RP 372, 376-78, 412; Ex.2, 5-13. Repetition is

itself proof of intent as it affords opportunity for reflection and foresight of the consequences. ***United States v. Fountain***, 768 F.2d 790, 805 (7th Cir. 1985); ER 404(b). Here, repetition joined a motive to successfully flee with stolen goods while avoiding arrest for a third strike.

Equally compelling proof of his use of a deadly weapon elevated the assault to second degree. A full bottle "carries significant weight and the neck ... may serve as a handle, two characteristics of a club ... mak[ing] [it] capable of producing death or great bodily injury." ***People v. Snyder***, 11 Cal. App. 4th 389, 393, 13 Cal. Rptr. 2d 837 (1992). Witness testimony, security video and the injuries Gouveia sustained collectively established this to be precisely the way in which defendant put the bottle to work against Gouveia, proving second degree assault by that means.

Reckless infliction of substantial harm was simultaneously proved by defendant's conscious disregard of the obvious risks in the clubbing he delivered to her head coupled with her resulting injuries. *See* ***State v. Keend***, 140 Wn.App. 858, 866-69 166 P.3d 1268, 1272 (2007). Jurors can find a result was recklessly inflicted where the defendant had information sufficient to alert a reasonable person to the obvious risk attending the charged act. *Id.* "Without question, any reasonable person knows ... punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm." *Id.* at 870 (*quoting* ***State v. R.H.S.***, 94 Wn.App. 844, 847, 974 P.2d 1253 (1999)). It is equally without question anyone would know, thus defendant knew,

repeatedly hitting Gouveia over the head with a full bottle could do as much or worse due to the greater force generated by the leverage and weight added to each blow. *Id.*; ***Snyder***, 11 Cal.App.4th at 393. Repeated blows to one obviously incapable of defense further proves resulting injuries were at least recklessly inflicted. ***State v. McKague***, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) *relief granted on other grounds* ***In re Makague***, 182 Wn.App. 1008 (2014); ***State v. Gamble***, 137 Wn.App. 892, 909, 155 P.3d 962 (2007), *aff'd,* 168 Wn.2d 161, 225 P.3d 973 (2010).

Meanwhile, the injuries Gouveia endured as a result of those blows were unmistakably substantial. "She was just covered in blood." 4RP 298-99, 328, 330; 5RP 371-72. 5RP 371. It took roughly five hours at a hospital to treat her injuries, which included a cut forehead, concussion, and gash requiring 13 staples to seal. 4RP 298-99, 303; 5RP 478. At trial, Gouveia still suffered the effects of what defendant considered to be an event without significance beyond its impact on his own life. 4RP 300-01. Her cognition remained appreciably impaired. 4RP 300-01. And the bottle-shaped gash he cut into her hairline had become a scar visible to her whenever she looked in a mirror. 4RP 276-77, 301. Lesser harm supports conviction for second degree assault. *E.g.*, ***McKague***, 172 Wn.2d at 806 (substantial harm consisted of bruising, swelling and lacerations).

Defendant did not altogether deny assaulting Gouveia as he sought conviction for third degree assault. 6RP 561. But confounding the request was defendant's use of a deadly weapon, which itself elevated the assault

to second degree. The lesser *mens rea* of criminal negligence further confounded the jury's ability to find assault in the third degree. CP 91-93 (Inst. 20-22). As there is no rational support for the proposition he merely "fail[ed] to be aware of a substantial risk ... an assault may occur" when he kept swinging the bottle at Gouveia's head to facilitate his escape. *E.g.*, ***Keend***, 140 Wn.App. at 863, 870 (recklessly broke jaw with one punch).

The *mens rea* attending defendant's infliction of Gouveia's injuries was a question of fact for the jury. A question not logically influenced by rebuttal challenging counsel's characterization of the robbery count; or if influenced, not to a degree capable of calling into doubt the capacity of twelve adults to fairly decide the beating he gave Gouveia rose to second degree assault, so his conviction should be affirmed.

2. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO TAXPAYERS SHOULD BE DENIED BECAUSE A COST BILL HAS NOT BEEN SUBMITTED AND THERE IS NO INJUSTICE IN A MAN CONVICTED OF CLUBBING A STORE CLERK WITH A STOLEN LIQUOR BOTTLE HAVING TO REPAY THE PUBLIC FOR HIS APPEAL.

a. Review of defendant's ability to pay costs should await a cost bill.

Objection to a cost bill is the appropriate procedure through which appellate costs should be challenged. RAP 14.4-14.5; *see* ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Blank***, 131 Wash. 2d 230,

243-44, 930 P.2d 1213 (1997). Through such an objection a defendant may urge an appellate court to waive costs. ***State v. Sinclair***, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016); ***State v. Caver***, ___ Wn.App. ___, ___ P.3d ___ (2016) (Slip No. No. 73761-9-I; 2016 WL 4626243, at *5).

Defendant should not be preemptively insulated from repaying our community the money it advanced for his appeal.

b. Any money defendant comes into would be more justly directed to costs than the prison commissary.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of legal financial obligations has been historically considered an appropriate method of ensuring able bodied offenders "repay society for a part of what it lost as a result of [their] crime." ***State v. Barklind***, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). More recently, this community-centric concept of restorative justice has been subordinated to an offender-centric concern for the difficulties anticipated to attend repayment. *E.g.* ***State v. Blazina***, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Ability to pay is a factor for consideration under RCW 10.73.160, "but it is not necessarily an indispensable factor." ***Sinclair***, 192 Wn.App. at 389; ***Caver***, *supra.*

According to the record developed in this case, defendant is a man able bodied enough to repeatedly club a store clerk over the head with a full liquor bottle, then forcefully drag her outside to escape with the liquor

he brutally assaulted her to steal. Prior to that offense, he proved strong enough to commit two robberies, first degree reckless burning, and an attempt to elude. CP 54. He also proved conniving enough to commit two forgeries. *Id.* Although conviction for his third strike, if affirmed, will make him less able to direct those abilities to profit oriented crime beyond prison walls, there are likely to be legitimate opportunities for him to earn money through prison labor. RCW 72.09.111. There will also be opportunities for him to spend it on "snacks ... sodas ... [and] personal items." DOC. Pol. 200.210; ER 201; http://www. doc. wa. gov/corrections /incarceration/commissary.htm. Directing any money he earns to costs is more just than shifting them to hardworking, overburdened taxpayers who rarely, if ever, avail themselves of the judicial resources recidivists like defendant so regularly consume.

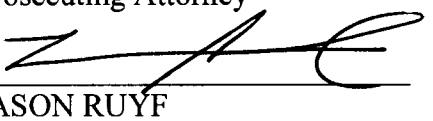
D. CONCLUSION.

Defendant's second degree assault conviction should be affirmed. The prosecutor's rebuttal did not disparage counsel's role or integrity when it recalled jurors to the way in which counsel's characterization of the now vacated robbery count was at odds with the court's binding instructions. Even if disparaging import is wrongly assumed, it could not logically spill over to the assault conviction at issue in this appeal or conceivably impact the verdict for such an exceedingly well-proved crime. The objection to

appellate costs is not ripe, but should otherwise fail since it is just for a recidivist offender to be compelled to repay some small measure of the considerable funds the community advanced on his behalf.

RESPECTFULLY SUBMITTED: December 8, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WEB # 38725

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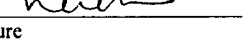
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-8-16 
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